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# In the Supreme Court of the United States

OCTOBER TERM, 1983

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IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

*v.*

RODRIGO LUIS OLIVAS-MONORREZ

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

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REX E. LEE
*Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

## QUESTION PRESENTED

Whether the Fourth Amendment's exclusionary rule should be extended to civil deportation proceedings.

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## TABLE OF AUTHORITIES


Case:

*Lopez-Mendoza* v. *INS*, 705 F.2d 1059, cert. granted, No. 83-491 (Jan. 9, 1984) .. 2, 3, 4

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IMMIGRATION AND NATURALIZATION SERVICE,
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RODRIGO LUIS OLIVAS-MONORREZ

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the Immigration and Naturalization Service, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

### OPINIONS BELOW

The opinions of the court of appeals (App., *infra*, 1a-2a), the Board of Immigration Appeals (App., *infra*, 4a-7a), and the immigration judge (App., *infra*, 8a-13a) are unreported.

### JURISDICTION

The judgment of the court of appeals was entered on September 21, 1983, and a petition for rehearing was denied on December 12, 1983 (App., *infra*, 3a). On March 2, 1984, Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including April 10, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Respondent is an alien who was found to have entered the United States without inspection, in violation of 8 U.S.C. 1251(a)(2). In lieu of deportation, the immigration judge granted him the privilege of voluntary departure, and the Board of Immigration Appeals (BIA) dismissed his appeal (App., *infra*, 4a). The court of appeals reversed the BIA's decision on the authority of *Lopez-Mendoza* v. *INS*, 705 F.2d 1059 (9th Cir. 1983) (en banc), cert. granted, No. 83-491 (Jan. 9, 1984), and remanded the case to the BIA for consideration of respondent's claim that he had been unlawfully arrested and that his admission of illegal alienage should have been suppressed as the "fruit" of the allegedly invalid arrest.

1. On April 14, 1981, respondent, while riding as a passenger in an automobile owned and operated by one David Hernandez, was arrested by Border Patrol agents about five miles outside of Wapato, Washington. Both respondent and Hernandez testified that the vehicle was functioning normally and traveling at a normal rate of speed; both claimed not to know why they were stopped. App., *infra*, 9a. In response to a request for their papers, respondent and Hernandez furnished "some papers from the attorney" (A.R. 23).[1] Respondent and Hernandez were then taken to the Wapato police station. While at the station, respondent admitted that he had entered the United States unlawfully. Respondent's admission was memorialized on a Form I-213, "Record of Deportable Alien," which was offered to prove his deportability at his deportation hearing. App., *infra*, 9a-10a.

One of the two Border Patrol agents who arrested respondent testified that the arrest was part of an opera-

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[1] "A.R." refers to the certified administrative record filed with the court of appeals.

tion in which six Border Patrol agents apprehended approximately 280 undocumented Mexican aliens in a six-day period (A.R. 32). The agent could not recall the exact details of respondent's arrest (A.R. 29), but testified that his customary procedure was not to stop anyone for questioning in the absence of articulable facts that would lead to the belief that the person stopped was probably an alien (A.R. 32). On the particular day that respondent was arrested, the agent added, he and his fellow officers already had gone to several different ranches and "we had cars and people running and going in different directions" (*ibid.*).

2. Based on the foregoing record, the immigration judge found that respondent had not met his burden of establishing an illegal arrest (App., *infra*, 11a). The immigration judge further ruled that, even if the arrest was illegal, the exclusionary rule does not apply to civil deportation proceedings (*ibid.*). On that basis, the Form I-213, which proved respondent's deportability, was admitted into evidence. The BIA affirmed this latter ruling (App., *infra*, 6a-7a), and also held that the circumstances surrounding respondent's arrest and interrogation were "not so egregious as to warrant exclusion of the evidence on the ground that its use would be fundamentally unfair" (*id.* at 7a). Finding deportability to have been established by clear, convincing, and unequivocal evidence, the BIA dismissed respondent's appeal (*ibid.*).

3. On petition for review, the court of appeals held that the BIA's ruling that the exclusionary rule does not apply in deportation proceedings was contrary to the court's recent decision in *Lopez-Mendoza* (App., *infra*, 2a). Since the BIA had neither passed on the merits of respondent's Fourth Amendment claim nor determined whether there was sufficient evidence apart from the Form I-213 to establish a prima facie case of alienage, the case was remanded to the BIA for further

proceedings (*ibid.*). The court of appeals subsequently denied the government's petition for rehearing, in which it was suggested that the case be held in abeyance pending action by this Court in *Lopez-Mendoza* (*App. infra*, 3a).

## REASONS FOR GRANTING THE PETITION

As noted above, the decision of the court of appeals reversing respondent's deportation order rests squarely on its earlier decision in *Lopez-Mendoza*. On January 9, 1984, this Court granted the petition for a writ of certiorari in that case (No. 83-491). The question presented is the applicability of the exclusionary rule to civil deportation proceedings. Accordingly, this Court's decision in *Lopez-Mendoza* should control the disposition of this case. In the circumstances, it is appropriate to hold this case for disposition in light of *Lopez-Mendoza*.

## CONCLUSION

The petition for a writ of certiorari should be held for appropriate disposition in light of the decision in *INS* v. *Lopez-Mendoza*, No. 83-491.

Respectfully submitted.

REX E. LEE
*Solicitor General*

MARCH 1984

APPENDIX A

# UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 82-7097

RODRIGO LUIS OLIVAS-MONORREZ, PETITIONER,

*v.*

IMMIGRATION AND NATURALIZATION SERVICE, RESPONDENT.

**Argued—February 8, 1983**
**Submitted—April 25, 1983**
**Decided—September 21, 1983**

**PETITION TO REVIEW A DECISION OF THE IMMIGRATION AND NATURALIZATION SERVICE**

## MEMORANDUM

Before: WALLACE, ANDERSON, and SCHROEDER, Circuit Judges.

Olivas-Monorrez petitions for review of the decision of the Board of Immigration Appeals (the Board) affirming an order of the Immigration judge finding him deportable for entry into the United States without inspection. We grant the petition and reverse and remand.

In a deportation proceeding involving a charge of entry without inspection, the government must sustain the initial burden of establishing a prima facie case of alienage before the presumption of 8 U.S.C. § 1361 arises to shift the burden of proof to the alien to show the time, place, and manner of his entry into the United States. *Sandoval-Vera* v. *INS*, 667 F.2d 792, 793 (9th Cir. 1982); *Corona-Palomera* v. *INS*, 661 F.2d 814, 816 n.2 (9th Cir. 1981). The evidence relied upon by the

government regarding Olivas-Monorrez's alienage was the form I-213 of the Immigration and Naturalization Service (INS). Olivas-Monorrez's motion to suppress this evidence as the fruit of an illegal arrest was denied.

The Board held that even assuming the fourth amendment violation, the evidence should not be suppressed because the exclusionary rule does not apply in a deportation proceeding. This court has recently held to the contrary. *Lopez-Mendoza* v. *INS*, 705 F.2d 1059 (9th Cir. 1983) (en banc). The Board did not pass upon the question of whether the form I-213 should be suppressed and, if so, whether there is other sufficient evidence establishing a prima facie case of alienage. The Board should have an opportunity to do so in the first instance.

The government contends that even without the form I-213, there was sufficient evidence to uphold the order of deportation. This argument may also be advanced to the Board on remand.

Olivas-Monorrez' contention that he was denied due process by the immigration judge's refusal to permit him to make a personal tape recording of the proceedings is without merit.

PETITION GRANTED; REVERSED AND REMANDED.

**APPENDIX B**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 82-7097

RODRIGO LUIS OLIVAS-MONORREZ, PETITIONER,

*v.*

IMMIGRATION AND NATURALIZATION SERVICE,
RESPONDENT.

PETITION TO REVIEW A DECISION OF THE
IMMIGRATION AND NATURALIZATION SERVICE

[Filed DEC. 12, ~~Sept. 21~~, 1983]

**ORDER**

Before: WALLACE, ANDERSON, and
SCHROEDER, Circuit Judges

The Memorandum disposition filed September 21, 1983, is amended as follows:

The last full paragraph of the disposition on page 2 is deleted, and the following is inserted in its place: "Olivas-Monorrez' contention that he was denied due process by the immigration judge's refusal to permit him to make a personal tape recording of the proceedings is without merit."

With this amendment, the petition for rehearing and the suggestion to hold in abeyance are denied.

**APPENDIX C**

UNITED STATES DEPARTMENT OF JUSTICE
BOARD OF IMMIGRATION APPEALS
WASHINGTON, D.C. 20530

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File: A26 520 451—Seattle

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In re: RODRIGO LUIS *OLIVAS*—MONARES aka RODRIGO LUIS OLIVAS-MONORREZ

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:

Paul D. Edmondson, Esquire
314 Miller Building
Yakima, Washington 98901

CHARGE:

Order: Sec. 241(a)(2), I&N Act (8 U.S.C. 1251(a)(2))—Entry without inspection

APPLICATION: Termination of the proceedings; or in the alternative, voluntary departure

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Jan. 26, 1982

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In a decision dated May 11, 1981, an immigration judge found the respondent deportable under section 241(a)(2) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(2), for having entered the United States without inspection. He granted the respondent voluntary departure until June 11, 1981. The respondent has appealed. The appeal will be dismissed.

The respondent is a married male alien, approximately 37 years of age. It is alleged that the respondent is a native and citizen of Mexico and that he entered the United States at San Luis, Arizona, on or about November of 1977 without submitting himself for inspection by an immigration officer.

At the hearing, the respondent was mute, refusing to admit or deny the allegations in the Order to Show Cause.[1] To establish deportability, the Service introduced a Form I-213, Record of Deportable Alien, prepared by United States Border Patrol Agent Jimmy L. Spence. That document indicates that the respondent is a native and citizen of Mexico and that he entered the United States without inspection at San Luis on or about November of 1977.

Counsel for the respondent objected to the introduction of this evidence and moved that it be suppressed as the fruit of an unlawful arrest. In support of his motion to suppress, the respondent testified that he was arrested by the Border Patrol about five miles outside of Wapato, Washington, while in an automobile owned and operated by David Hernandez. The respondent testified that at approximately nine o'clock on the morning in question, he and Mr. Hernandez were proceeding from one job to another when they came to a crossroad. Mr. Hernandez stopped his vehicle at the "stop" sign and observed an automobile approaching on the crossroad. He testified that after stopping they proceeded across the intersection after which time the automobile turned from the crossroads in behind them and pulled them over. The respondent testified that there were Border Patrol Agents in the automobile. He further testified that he did not know why they were stopped by the agents and he does not know whether the driver

[1] The respondent did not invoke his Fifth Amendment privilege, he was simply mute.

had any idea why they were stopped. He stated that the automobile in which he was riding was traveling at a normal rate of speed and that he said, to his knowledge, there was nothing mechanically wrong with the automobile. Mr. Hernandez, the driver, testified that the respondent's testimony was essentially correct.

Agent Jimmy L. Spence testified on behalf of the Service. He identified the Form I-213 as having been completed by him from information provided by the respondent.[2] He did not recall the specific incident, but he did remember that the respondent and Mr. Hernandez were arrested in an automobile and that they were processed in Wapato, Washington. He also testified that the respondent was one of approximately 280 undocumented aliens apprehended by six agents during a six day operation in the Wapato area. He further testified that it was his usual practice to stop an automobile to question its occupants if he had articulable facts indicating that the persons in the vehicle were aliens. R-16.

Forms I-213 have been held to be admissible in deportation hearings. *See Matter of Mejia*, 16 I&N Dec. 6 (BIA 1976); *Matter of Rojas*, 15 I&N Dec. 722 (BIA 1976). *Trias-Hernandez* v. *INS*, 528 F.2d 366 (9 Cir. 1975). The respondent argues that the I-213 in this case should be suppressed because the Service has not established that the Border Patrol Agent who stopped the vehicle in which the respondent was riding had articulable facts to support his suspicion that the occupants of the vehicle were aliens illegally in the United States. *United States* v. *Brignoni-Ponce*, 422 U.S. 873 (1975). We find this argument to be without merit. Considering the testimony in its entirety, we find no basis for excluding the Form I-213. This form is supported by

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[2] Through his testimony, Agent Spence authenticated the Form I-213. *See Trias-Hernandez* v. *INS*, 528 F.2d 366 (9 Cir. 1975); *compare Iran* v. *INS*, 656 F.2d 469 (9 Cir. 1981).

the testimony of Border Patrol Agent Spence, who identified the respondent and testified that the information on the Form I-213 was taken from him. Even assuming the arrest was unlawful, that fact alone would not warrant excluding this evidence because the exclusionary rule is not applied in deportation proceedings as a remedy for violation of a respondent's Fourth Amendment rights. *Matter of Sandoval*, Interim Decision 2725 (BIA 1979). Further, the circumstances surrounding the arrest and interrogation as alleged by the respondent are not so egregious as to warrant exclusion of the evidence on the ground that its use would be fundamentally unfair. *Matter of Toro*, Interim Decision 2784 (BIA 1980). *Compare*, for example, *Matter of Garcia*, Interim Decision 2778 (BIA 1980); *Navia-Duran* v. *INS*, 568 F.2d 803 (1 Cir. 1977); *Bong Youn Choy* v. *Barber*, 279 F.2d 642 (9 Cir. 1960) (involving involuntary statements). Further, even accepting as true everything in the respondent's testimony, there is no evidence of any intentional or reckless violation of the respondent's constitutional rights. Finally, there is nothing of record to raise any doubt as to the reliability of the information on the Form I-213. Therefore, we conclude there is no basis for excluding the Form I-213 on these facts, and that deportability has been established by clear, convincing, and unequivocal evidence.

Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

/s/ _____

DAVID L. MILHOLLAN
*Chairman*

**APPENDIX D**

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND
NATURALIZATION SERVICE

File: A26 520 451—Seattle

In re: RODRIGO LUIS OLIVAS-MONARES A/K/A
RODRIGO LUIS OLIVAS-MONORREZ,
RESPONDENT
IN DEPORTATION PROCEEDINGS

IN BEHALF OF RESPONDENT:

PAUL D. EDMONDSON, ESQ.
314 Miller Building
Yakima, Washington 98901

CHARGES:

Section 241(a)(2), I&N Act-Entered without inspection.

APPLICATION: Termination of proceedings; in the alternative, voluntary departure in lieu of deportation.

IN BEHALF OF SERVICE:

KENDALL B. WARREN
Trial Attorney
Seattle, Washington

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[Filed Mar. 11, 1981]

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**ORAL DECISION OF THE U.S. IMMIGRATION JUDGE**

The respondent is a 37-year old married male. The allegations are denied. They assert that he is not a citizen or national of the United States, but is a native and citi-

zen of Mexico, who entered the United States at San Luis, Arizona, in November, 1977, not having been inspected by a United States Immigration Officer. Deportability is denied. Mexico is designated as country of deportation should deportation become necessary, and the respondent has applied for voluntary departure in lieu thereof.

Exhibit #3 is a Form I-213, Record of Deportable Alien, relating to the respondent. The respondent has moved that the information in this document be suppressed as it is tainted, being the result of an illegal arrest. Therefore, the information contained therein is the "fruit of the poisoned tree" and should not be used against him.

The respondent testified that he was arrested by the Border Patrol about 5 miles outside of Wapato, Washington, while in an automobile owned and operated by one David Hernandez. Respondent testified that Mr. Hernandez had stopped the vehicle at a stop sign or intersection. There was on the crossroad an approaching automobile. The respondent and Mr. Hernandez were proceeding to work as it was nine o'clock in the morning. They had just left one job and were going to another. According to his testimony, after they had crossed the intersection the automobile on the crossroad turned in behind them and began to follow them. This vehicle then turned its lights on and signaled to pull over to the side of the road. There was a Border Patrol agent or agents in this automobile. The respondent said that he does not know why they were stopped by the Border Patrol agents and he does not know whether the driver had any idea why they were stopped. The automobile in which he was riding was traveling at a normal rate of speed and he said that, to his knowledge, there was nothing wrong mechanically with the automobile. He stated that they were asked if they had any papers and told the agent who spoke to

them that they [*sic*] only papers they had were some papers from their attorney. They showed these papers to the agent. The respondent testified that they were then, that is he and Mr. Hernandez, taken to Wapato, Washington Police Station where they remained for approximately 24 hours.

David Hernandez testified on behalf of the respondent. He said that he was arrested near Wapato, Washington. He was driving an automobile at the time. He heard the respondent's testimony and said that everything he said was correct except that part about the direction of the automobile. According to Mr. Hernandez, he does not know why he was stopped. At first, he said, when he was stopped he thought he was being stopped by a local policeman.

Jimmy L. Spence, a Border Patrol agent, testified on behalf of the Service. He identified the I-213 as being completed by him from information obtained from the respondent. He does not recall or does not remember the exact incident. He does remember the respondent and Mr. Hernandez were arrested in an automobile and that they were processed in Wapato, Washington. He said that at the time Border Patrol Agent Haines was with him. Spence said that this particular area, some 1500 miles from the Mexican Border and a rich agricultural farmland area, has a large Mexican population. It is not uncommon, Spence said, to see a person of Mexican descent in the area. According to his testimony, the Border Patrol has arrested around the area many undocumented Mexican aliens and, in fact, on this operation Border Patrol agents apprehended somewhere in the vicinity of 280 undocumented Mexican aliens. The operation in question was for the purpose of identifying and arresting undocumented aliens. He admits that on some occasions they question individuals who are legally in this country and are not undocumented. Although he did not remember the exact incident, he said that

the customary procedure is not to arrest anyone unless you have articulable facts which would lead you to believe that the person you question is an alien who needs to be questioned as to his right to be in this country.

Under Section 287 of the Immigration and Nationality Act, a Service officer has a right to question or interrogate any alien or person believed to be an alien as to his right to be or remain in the United States. Either Spence or Haines questioned the respondent. The respondent contends that there were no articulable factual circumstances which would lead the agents to believe that he is an alien. Border Patrol Agent Spence testified that he does not remember the incident but does remember processing the respondent and preparing the Form I-213, Record of Deportable Alien. As mentioned, the respondent contends that the information on this form should be suppressed.

Based on this record, I find that the respondent has not met his burden of establishing an illegal arrest. The most that can be said is that he has established that, as far as he and the driver of the automobile in which they were traveling knew, there was nothing wrong with the automobile and they were traveling at a normal rate of speed. However, Border Patrol Agent Spence could not remember the incident and there may have been articulable facts which led to their being stopped and questioned. However, even if the arrest were illegal, the exclusionary rule does not apply to a deportation proceeding, which is civil and not criminal in nature. This has been held by the Courts. Not only this, it has been held to be so by the Board of Immigration Appeals and the Attorney General of the United States, who has recently refused to certify to himself a Board decision to this effect.

Form I-213, Record of Deportable Alien, Exhibit #3, has been identified by Spence, the maker of this document, as relating to the respondent, and being pre-

pared by him, Spence. The information contained in this document was obtained from the respondent. This information is not being challenged as to its correctness. The information reflects that the respondent was born in Mexico and is a citizen of that country. It shows that he last entered the United States at San Luis, Arizona, without inspection in November of 1977. When birth in a foreign country is established, the burden is on the respondent to prove United States citizenship if this is claimed. The respondent did not claim this. Therefore, it has been established that he is an alien. When alienage is established, the burden is on the alien to prove date, place and manner of entry or he is presumed to be in the United States in violation of law (Section 291 of the Immigration and Nationality Act). The respondent has not met this burden. Based upon Exhibit #3 and the presumption, I find that the allegations have been established and that the respondent is deportable on evidence which is clear, unequivocal and convincing.

In connection with the respondent's application for voluntary departure, he testified that he has in the United States a wife, three sons, and a daughter. One of the sons has been here for some seven years and has applied for suspension of deportation. He said that, when he brought his family to this country, he hired the services of a smuggler and paid him approximately $400. He also said that he was apprehended in 1975 by Service officials and granted voluntary departure, departing for Mexico, remaining out approximately one month, returning the same month. Apparently, his wife is undocumented as are all his children. The record reflects that he is able to depart at his own expense and I will assume that he would do so, if required. He said he was offered voluntary departure as a result of this last apprehension but would not accept it until such time as

he talked to his attorney. Voluntary departure is an application which is discretionary with the immigration judge and, although the Government opposes it, I will grant it as a matter of administrative discretion.

ORDER: It is ordered that, in lieu of an order of deportation, respondent be granted voluntary departure without expense to the Government on or before June 11, 1981, or any extension beyond such date as may be granted by the District Director, and under such conditions as the District Director shall direct.

IT IS FURTHER ORDERED that, if respondent fails to depart when and as required, the privilege of voluntary departure shall be withdrawn without further notice or proceedings and the following order shall thereupon become immediately effective: Respondent shall be deported from the United States to Mexico on the charge contained in the Order to Show Cause.

/s/ _____
NEWTON T. JONES
*U.S. Immigration Judge*